

STATE OF MICHIGAN
COURT OF APPEALS

FRANK CLEMENT,

Plaintiff-Appellee,

v

ELAINE CLEMENT,

Defendant-Appellant.

UNPUBLISHED

August 21, 1998

No. 198846

Saginaw Circuit Court

LC No. 95-008081 DM

Before: White, P.J., and Hood and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce that ended her twenty-seven year marriage to plaintiff. Defendant challenges the property distribution provisions of the divorce, as well as the refusal of the court to award attorney fees to defendant.

The parties were married in 1969, when defendant was 16 and plaintiff was 18 years of age. They had three children together, Kevin, born in 1967, Frank, born in 1970, and April, born in 1974. The date that they permanently separated was in dispute, but was sometime between 1976 and 1980. Plaintiff also fathered four children outside the marriage, three born in 1973, 1974 and 1977, respectively, to Patricia Cooper, and one born in 1977 to Patricia Cooper's cousin. Defendant also had another child, in 1984, after the date of the parties' separation.

Plaintiff was employed at General Motors' Saginaw Metal Casting Plant, and earning \$35,700 per year, when he sustained a back injury at work that required back surgery. He claimed that he was "mishandled" during the surgery and ultimately filed a malpractice claim. As a result of that claim, plaintiff received a settlement amount of \$1,600,000, of which he received a net of \$1,008,181.99 after deductions. He also had a workers' compensation claim pending. The record also reflects that he was receiving a General Motors pension of \$570 per month and \$897.30 per month in social security benefits.

Defendant is a high school graduate and has acquired a cosmetology certificate. She has subsisted on ADC payments, and testified that she has never relied on plaintiff for support and received no support from him over the years. Plaintiff acknowledged that he has supplied no support to plaintiff

on a regular basis since the parties separated. All child support arrearage had apparently been paid prior to the divorce. Defendant had been employed recently at a day care center owned by her aunt, where she received compensation of \$5 per hour, amounting to approximately \$50 per week. Other than the employment at the day care center, she had engaged in no other employment since the parties' marriage.

The trial court awarded defendant one half of plaintiff's pension, and \$15,000 in cash, and denied defendant's request for attorney fees beyond \$750 that had been awarded in connection with temporary alimony required during the pendency of the proceedings.

Defendant first claims that the trial court's factual findings supporting its decision regarding the parties' property distribution were nonexistent and that the distribution itself was unfair and inequitable. We agree. The goal, in distributing marital assets in a divorce proceeding, is to reach an equitable distribution of the property in light of all circumstances. *Byington v Byington*, 224 Mich App 103, 114; 569 NW2d 141 (1997). In making the distribution, the court should consider the duration of the marriage, the contribution of each party to the marital estate, each party's station in life, each party's earning ability, each party's age, health and needs, fault and past misconduct, and any other equitable circumstance. *Sparks v Sparks*, 440 Mich 141, 158-160; 485 NW2d 893 (1992). The operative language of the trial court's opinion states, in its entirety:

The parties were married in 1969. Some where between 1976 and 1980 they stopped residing together permanently. They continued to file joint tax returns until 1981. Prior to then there were periodic separations. Three children were born to the parties. All are now adults.

The Plaintiff was a General Motors hourly employee during this marriage. After the parties had ceased residing together the Plaintiff received a work related injury. The medical care he received to treat this injury resulted in a medical malpractice suit in which the Plaintiff received a substantial judgment.

Except for child support which is not an issue in this trial, the Defendant bore the brunt of raising and nurturing the children and the issue of fault favors the Defendant.

The marital estate will be divided as follows:

A qualified domestic relations order will divide the General Motors pension equally.

The Plaintiff will pay \$15,000 to the Defendant within 30 days of this judgment.

There will be no alimony awarded to either party and none will be reserved.

Each party will receive the personal property in their possession and each will be responsible for their own attorney fees.

The opinion obviously does not indicate that it expressly considered the following enumerated factors: (1) the contribution of the parties to the marital estate; (2) the age of the parties; (3) the health of the parties; (4) the life status of the parties; (5) the necessities and circumstances of the parties; (6) the earning ability of the parties; (7) the past relations and conduct of the parties; and (8) general principles of equity. Because the trial court opinion does not adequately consider all relevant factors, we conclude that the trial court's factual findings were not sufficiently specific.

While it is true that any presumption of equality with respect to the distribution of the marital estate diminishes when parties publicly manifest an intent to lead separate lives, *Byington*, *supra* at 115, citing *Wilson v Wilson*, 179 Mich App 519, 524; 446 NW2d 496 (1989), that circumstance alone is not sufficient to justify the totally disparate disposition in this case.

Although assets earned during the course of a marriage are generally considered part of the marital estate and are subject to division, generally separate assets cannot be invaded. *Reeves v Reeves*, 226 Mich App 490, 494; ___ NW2d ___ (1997). However, even separate estates may be invaded when division of the marital estate is insufficient to suitably support the maintenance of the other party. *Id.*, citing MCL 552.23(1); MSA 25.103(1). In this case, even if plaintiff's medical malpractice settlement proceeds are the personal property of plaintiff, they are still subject to the trial court's jurisdiction for purposes of equitable division incident to the divorce proceeding. *Id.* Under the circumstances, we conclude that a remand is necessary to allow the trial court to render an equitable property division that properly recognizes the *Sparks* factors.

Defendant's second claim is that the trial court's determination awarding plaintiff 100 percent of any proceeds realized from his worker's compensation claim against General Motors was also unfair and inequitable. Plaintiff's worker's compensation claim is a marital asset because it was earned during the course of the marriage. *Lee v Lee*, 191 Mich App 73, 79; 477 NW2d 429 (1991); *Evans v Evans*, 98 Mich App 328, 330; 296 NW2d 248 (1980). However, the purpose of worker's compensation benefits is to support the injured worker and his family, but primarily, of course, the injured worker. *Evans*, *supra*. Therefore, although technically a marital asset, we find that the trial court's decision awarding plaintiff 100 percent of this asset was neither unfair nor inequitable.

Defendant's final claim is that the trial court committed a manifest abuse of discretion by failing to award her additional attorney fees at the conclusion of the divorce proceedings. Although attorney fees are generally not recoverable as of right in divorce actions, *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1982), "reasonable" attorney fees may be awarded pursuant to MCR 3.206(C)(2), formerly MCR 3.206(A)(2), when it is necessary to enable a party to carry on or defend an action, *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). A trial court has broad discretion to determine what constitutes "reasonable" attorney fees, *In re Krueger Estate*, 176 Mich App 241, 248; 438 NW2d 898 (1989), but a party should not be forced to invade their share of the marital assets in order to meet their attorney fees. *Id.* We find that requiring defendant to pay attorney fees of \$5000 to \$7000 out of a \$15,000 property settlement was an abuse of discretion. On remand, the trial court shall reconsider the matter of attorney fees in light of its new findings on property distribution.

Reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White

/s/ Harold Hood

/s/ Hilda R. Gage